No. 01-631

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

UNITED STATES OF AMERICA, Petitioner

v.

CHRISTOPHER DRAYTON, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Christopher Drayton, asks leave to file the enclosed Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39, and Title 18, U.S.C., 3006A(d)(6). The filing of this petition is a continuation of the representation of the defendant under a Criminal Justice Act appointment of the Office of the Federal Public Defender for the Northern District of Florida, by the United States District Court. Supreme Court Rule 39 therefore does not require that any affidavit be filed with this motion.

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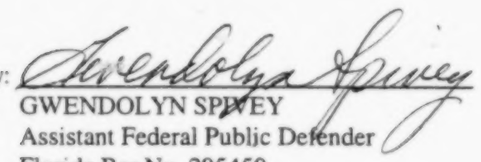
WHEREFORE, Respondent, Christopher Drayton, prays for leave to proceed *in forma pauperis*.

Dated this November 14, 2001.

Respectfully submitted,

RANDOLPH P. MURRELL
FEDERAL PUBLIC DEFENDER

By: 

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UNITED STATES OF AMERICA, Petitioner

v.

CHRISTOPHER DRAYTON and
CLIFTON BROWN, JR., Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF IN OPPOSITION

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November 14, 2001

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS HAS ADOPTED A *PER SE* RULE OR HAS APPLIED THE TOTALITY-OF-THE-CIRCUMSTANCES TEST APPROVED IN FLORIDA V. BOSTICK, 501 U.S. 429 (1992)?

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No. 01-631

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 2001

UNITED STATES OF AMERICA, Petitioner,

v.

CHRISTOPHER DRAYTON and
CLIFTON BROWN, JR., Respondents.

BRIEF IN OPPOSITION

The Respondents, Messrs. Drayton and Brown, respectfully ask this Honorable Court to deny the petition for writ of certiorari sought by Petitioner to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on October 24, 2000.

OPINIONS BELOW

A published opinion of the United States Court of Appeals for the Eleventh Circuit is reported as United States v. Drayton, 231 F.3d 787 (11th Cir. 2000). The district court decision was unreported.

JURISDICTION

This Court's jurisdiction was invoked under 28 U.S.C. § 1254(1). After the court of appeals' Opinion on October 24, 2000, Petitioner's request for rehearing en banc was denied May 16, 2001. Petitioner was then granted until October 12, 2001, to file its petition.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ..

STATEMENT OF THE CASE

A. Course of Proceedings

Both Respondents were charged by indictment with Conspiracy to Possess Powder Cocaine, and with Possession of Powder Cocaine, with Intent to Distribute.

After evidentiary hearing, the district court entered oral findings and denied both Respondents' motions to suppress.

Mr. Drayton was found guilty on both counts after trial by jury, and Mr. Brown pled guilty to the conspiracy count.[1] The district court sentenced Mr. Drayton to 120 months imprisonment and eight years supervised release and Mr. Brown to 88 months imprisonment and five years supervised release.

---

[1]The government incorrectly cites Mr. Brown's first name and incorrectly identifies his plea and conviction as based on both counts. (Pet. at 2)

On direct appeal, the United States Court of Appeals for the Eleventh Circuit reversed the Respondents' convictions and remanded to the district court with instructions that the Respondents' motions to suppress be granted. The government's petition for rehearing en banc was denied, with no dissent. The government never filed a motion to stay.

On remand, the district court complied with the instructions of the court of appeals; it reversed the convictions and granted the motions to suppress. In addition, the district court ordered Respondents released from custody under pretrial supervision and granted the government's motion to stay further proceedings pending resolution of this petition.

B. Facts

The only testimony at the suppression hearing was from Investigator Rufus Lang of the Tallahassee Police Department (TPD), Tallahassee, Florida.

General Procedure for Drug Interdiction Stops at Bus Station

Inv. Lang had been involved in drug interdiction stops at the Greyhound Bus Station in Tallahassee for three years. He testified he is very polite and puts his "total focus" on the passenger. Attempting to demonstrate how he speaks just loud enough for the individual passenger, the record reflects that his voice could be heard throughout the courtroom.

Inv. Lang shows passengers his badge "so that they will know that [he is] the authority." The overwhelming majority of people believe they have a duty to cooperate with him and are cooperative. Although Inv. Lang did not tell passengers on the date in question that they could refuse to be searched, he has in the past said something like, "You do have a right to refuse, but I would like for your cooperation."

Although Inv. Lang testified that the officers never delayed a bus's departure, he also testified that "they give us an opportunity to check each and every bus that's coming from the south."[2] The officers board "maybe three" buses arriving at 5:00 a.m. and four or five buses arriving at Noon; the searches are generally conducted three to four days a week. They are on each bus 15 to 20 minutes and usually check two to three people.

Inv. Lang tells the passenger on whom he is focused that he wants to search his/her bag and then immediately proceeds to ask if he/she has a bag. He never asks it as a question, e.g., "Will you cooperate?"

Statistics

The defense noted that, based on Inv. Lang's testimony, he would have searched 1,040 buses in one year. In the past year, Inv. Lang estimated that five or six people, "not very many," refused to consent to a search. Given his estimated average of 25 people per bus, in three years the officers would have had the opportunity to interact with 78,000 passengers, out of which only five or six had refused – less than 1/100th of one percent. In the past year, he recalled arresting 13 or 14 people at the bus station carrying drugs.

[2]Inv. Lang testified they focus on passengers from south Florida. More than one court has questioned whether agent testimony as to "source cities" is reliable. See, United States v. Grant, 920 F.2d 376, 386 (6th Cir. 1990). The government acknowledged to the district court that bus passengers are "generally economically disadvantaged." "They need to go somewhere, and that's the only way they've got to get there."

Respondents' Search and Arrest

On February 4, 1999, three[3] TPD officers boarded a bus. The bus had come from Ft. Lauderdale and was going to Detroit, Michigan. Inv. Lang thought there were about 25 to 30 passengers that day. Bus company policy requires all passengers to deboard in this situation.

After the passengers reboarded for departure, the bus driver finished checking their tickets and exited the bus. The driver went to handle paperwork in the terminal office. The three officers asked his permission and boarded the bus once the passengers were seated. They did not make a general announcement or hold up their badges for everyone to see. They did not tell passengers they could refuse to be searched or had a right to leave the bus.

The three officers were dressed casually, with their police badges either hanging around their necks or held in their hands. After showing his badge to the individual passenger, the badge either falls back on the chain or is placed in his pocket. Inv. Lang and the two other officers wore their guns in holsters on their sides, but he testified they were covered by either a shirttail hanging out or a jacket; he did not remember specifically what he wore that day. There was no evidence passengers did or did not see the officers' weapons or otherwise assume they were armed.

Inv. Hoover kneeled in the driver's seat of the bus, facing backwards to observe the passengers.[4] Inv. Hoover could see the passengers, and they could see him.

[3]Petitioner's Question Presented indicates there were only two officers, while its Statement correctly concedes there were three.

[4]At trial, Inv. Lang testified that Inv. Hoover stopped at the front of the bus and observed people from outside the bus.

Inv. Lang and Ofr. Blackburn went to the back of the bus and worked forward. Ofr. Blackburn checked the luggage of the passenger in the rear seat while Inv. Lang observed, and then Inv. Lang began working forward on the bus with Ofr. Blackburn assisting. After checking the rear passenger and the next two forward, Inv. Lang approached the Respondents' seats on the driver's side of the bus. Mr. Drayton was seated on the aisle and Mr. Brown by the window.

Inv. Lang testified that he stood beside Respondents, and Ofr. Blackburn was standing next to him. (The prosecutor described Inv. Lang as a "big" man.) There is a clearance of about 2-3 feet between the seated passengers' heads and the overhead luggage rack; the passenger in the window seat would have to duck his/her head to get out. Nevertheless, Inv. Lang opined he did not block the path to exit the seats. He did not have probable cause or a reasonable suspicion to search or arrest Respondents. The sole basis of his search was consent.

Inv. Lang leaned over the shoulder of Mr. Drayton to speak to Respondents. He held his badge up in his hand, with his face about 12-18 inches from Mr. Drayton's and a couple feet from Mr. Brown's. He agreed with the court's characterization that his style was "kind of 'in your face.'" Inv. Lang told Respondents:

> I'm Investigator Lang out of Tallahassee Police Department. We're conducting bus interdiction, make sure there's no weapons or drugs[5] on the bus. We would like for your cooperation. Do you have any luggage on the bus?

---

[5]Inv. Lang admitted at trial, consistent with his report, that he asked the men's permission to search only for weapons.

He never asked them, "Will you cooperate?" He either put his badge back in his pocket or let it fall on the chain once he explained who he was.

Inv. Lang asked the men if they had a carry-on bag. Mr. Brown pointed to the green bag above their head. Inv. Lang asked, "Do you mind if I check it?," and Mr. Brown responded, "Go ahead." Inv. Lang reached for the bag and handed it to Ofr. Blackburn, who searched it and found nothing illegal.

Inv. Lang turned his attention back to Mr. Drayton and Mr. Brown and noticed[6] that they were both wearing large jackets and baggy pants. He thought it kind of odd to be dressed like that, since it was somewhat warm. He acknowledged Mr. Drayton was bound for Indiana, "up where it's very cold." He also agreed it might get cold on the bus, particularly if the passenger is seated where air conditioning might be blowing., He agreed this might be a very good reason to have on a jacket, irrespective of outside temperature.[7]

Inv. Lang's attention was more on Mr. Brown because he was more communicative, while Mr. Drayton was "being real quiet." Inv. Lang asked Mr. Brown if he had any weapons or drugs on him and asked, "Do you mind if I check your person?," to which Mr. Brown replied, "Sure." Mr. Brown went into his pocket and pulled out a cell phone, and then held his coat open.

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[6]At the suppression hearing, the court specifically asked Inv. Lang: "Did you have anybody targeted or anything like that?" Inv. Lang responded, "No sir. I just observed them because of what they were wearing, and the weather wasn't that cold in Tallahassee at the time." He said nothing about seeing them before they were on the bus. At trial, however, he testified that he first noticed them inside the terminal, during the stopover.

[7]At trial, he acknowledged that Mr. Drayton had to change buses in Tallahassee but was unsure if this was why he wore his coat off the arriving bus.

Inv. Lang, reaching across Mr. Drayton, checked Mr. Brown's jacket and pockets and then his waist area. He asked Mr. Brown to lean up for him and then checked him from behind. Then Inv. Lang frisked down the front of Mr. Brown's pants from the waistband to the tops of his thighs. On both thighs, he felt hard objects inconsistent with normal human anatomy.

Inv. Lang asked Mr. Brown to step into the aisle, where Inv. Lang handcuffed him. Inv. Hoover came from the front and removed Mr. Brown from the bus.

Inv. Lang then turned his attention back to Mr. Drayton and asked, "Mind if I check you?" Mr. Drayton did not answer but lifted his hands "maybe eight inches off his legs." Inv. Lang's frisk turned up the same thing, so Mr. Drayton was handcuffed and removed.

Post-arrest

In an adjacent parking lot, Inv. Lang unbuttoned the men's pants and discovered bundles of powder cocaine. Mr. Brown had 483 grams, and Mr. Drayton had 295 grams.

The Presentence Investigation Report (PSI) indicates that Mr. Drayton was a poor student who graduated high school with difficulty. At the station, Mr. Drayton repeatedly said he was going to sell the drugs in "downtown Indiana."

Inv. Lang did not get the names and addresses of any witnesses to this incident. He explained:

> On that bus people don't like giving out their name and don't like giving out information in reference to what they're doing. So I don't want to inconvenience them at that time.

Appeal

The court of appeals summarized the issue, and its conclusion, as follows:

> The only issue before this Court is, as we put it in *Washington*, 151 F.3d at 1355, whether the consent given by each defendant for the search was "uncoerced and legally voluntary" under the Fourth Amendment. Because the facts of this case are not distinguishable in a meaningful way from those in *Washington*, we are compelled by that decision to hold that these defendants' consent was not sufficiently free of coercion to serve as a valid basis for a search.

(App. to Pet. at 2a)

SUMMARY OF THE ARGUMENT

Petitioner, understandably upset over its loss below, overstates its case. It argues the court below has erected a *per se* rule, when in fact the court below has expressly and repeatedly declined to do so. Instead, the court below has carefully followed this Court's guidance in Florida v. Bostick and Schneckloth v. Bustamonte requiring consideration of all the factors - the totality of the circumstances - in determining the voluntariness of consent of a bus passenger.

Likewise, there is no conflict between the circuits, as the single decision cited by the government misperceived the position of the court below, and the court below declined to address that case.

The government also misstates and omits critical facts. This case is distinguished by the fact that the passengers were not subjected merely to searches of their luggage - they were also subjected to having their thighs and mid-sections frisked in public. This was an indignity to which *no one* traveling on public transportation - who was free to do otherwise - would likely consent. Further, the officers' admitted failure to await a response before initiating their frisks made clear that the passengers' consent or lack thereof was irrelevant.

ARGUMENT

Petitioner misstates both the facts and the ruling below. Contrary to its representations, the court of appeals did not erect a *per se* rule but expressly rejected such a rule, adhering to this court's totality of the circumstances test in determining the voluntariness of consent. Petitioner is simply unhappy at this late juncture that the facts it created were inadequate under the totality-of-the-circumstances test to prove a voluntary consent.

A. The Court of Appeals' Decision is Entirely Consistent With This Court's Precedent.

Petitioner claims that the decision below "represents a marked deviation from this Court's teachings." (Pet. at 11)[8] Its position is simply unfounded. Petitioner's argument centers on its claim that the court of appeals has erected a *per se* rule in contravention of Florida v. Bostick, 501 U.S. 429, 438, 111 S. Ct. 2382, 2388 (1991).

In Bostick, this Court rejected the Florida Supreme Court's *per se* prohibition against searches of bus passengers or their luggage. This Court concluded that the "accurate measure of the coercive effect of" the police-citizen encounter is "whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter." 501 U.S. at 436, 111 S. Ct. at 2387. "The crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his

[8]Petitioner claims the decision below "contravened 'a long, unbroken line of decisions'" allowing police officers to approach individuals "'and ask them potentially incriminating questions' without effectuating a seizure." (Pet. at 11) Petitioner argues the decision below "carve[d] out an exception for encounters that occur on a bus." Id.

business.'" 501 U.S. at 437, 111 S. Ct. at 2387, quoting Michigan v. Chestnut, 486 U.S. 567, 569, 108 S. Ct. 1975, 1977 (1988).

The totality of the circumstances test for consent searches was set out in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041 (1973). It provides that the government bears the burden of proving that consent was voluntary, based on

> the totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation. . . . Factors taken into account have included the youth of the accused; his lack of education . . . or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep. . . . While the state of the accused's mind, and the failure of the police to advise the accused of his rights, [are] certainly factors to be evaluated in assessing the "voluntariness" of an accused's responses, they [are] not in and of themselves determinative.

412 U.S. at 226, 93 S. Ct. at 2047. Bostick then noted that two factors among others are relevant to searches on buses, i.e., whether the police told the passenger he had a right to refuse consent and the fact that the encounter takes place in a cramped environment. 501 U.S. at 432-37, 111 S. Ct. at 2385-87.

The court of appeals in no way erected a *per se* rule. It did not prohibit officers from approaching bus passengers, from questioning passengers, from asking permission to search passengers' luggage, or even from frisking passengers. All the court did was, in the context of this case, apply the precedent of this Court and conclude that the frisks of Respondents' mid-sections and thighs were not based on valid consent.[9]

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[9]Petitioner also implies this is primarily a question of a valid seizure, as opposed to the argument and ruling below focusing on the issue of consent.

In fact, the court below has repeatedly "declined to adopt a rule requiring police officers to notify bus passengers of their right to refuse to consent to search of their belongings." United States v. Standberry, 204 F.3d 1123 (11th Cir. 1999) (unpublished decision) (App. A, *infra*, at 2),[10] citing United States v. Guapi, 144 F.3d 1393 (11th Cir. 1998) (rejecting "the notion of a *per se* rule requiring bus passengers to be informed of their constitutional rights"); United States v. Washington, 151 F.3d 1354 (11th Cir. 1998) (acknowledging that this Court "has steadfastly rejected the notion of imposing *per se* rules on police officers conducting warrantless searches" and examining the totality of the circumstances).[11]

If the court below had indeed erected a *per se* rule, as Petitioner argues, there would have been no need for this case or for other circuit precedent on this point to have discussed and weighed each of the relevant factors. Contrary to Petitioner's argument, the court of appeals has consistently followed this Court's totality-of-the-circumstances test. See Guapi, 144 F.3d at 1393-96; Washington, at 1355-57; United States v. Hill, 228 F.3d 414 (11th Cir. 2000) (unpublished decision) (App. B, *infra*); see also, App. to Pet. at 8a n. 6.

Similarly, there would be no cases in which the court below had affirmed the denial of the motion to suppress, a point the Petitioner omits. See, e.g., United States v. Smith, 201 F.3d 1317 (11th Cir. 2000) (unpublished decision) (App. C, *infra*); United States v. Fields,

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[10]The three unpublished decisions cited are in the Appendix.

[11]Much of Petitioner's grievance seems to be with the Washington decision, but it did not even seek this Court's review in that case.

909 F.2d 470 (11th Cir. 1990); United States v. Hammock, 860 F.2d 390 (11th Cir. 1988).[12]

Thus, there is no conflict between the decision below and this Court's precedent. Petitioner merely disagrees with the weighing of the factors by the court of appeals in this particular case.

B. There is No Conflict Among Circuits Concerning Bus Interdiction Programs.

Mere disagreement between circuits in individual factual scenarios as to the application of the various factors or the weight of a particular factor does not constitute the type of conflict requiring this Court's intervention or clarification.[13]

First, the government cites only one decision as disagreeing with the court below. United States v. Broomfield, 201 F.3d 1270, cert. denied, 531 U.S. 830 (2000). First, Broomfield recognized early and often that determining whether consent was voluntary required the "application of .. . [an] objective, fact specific test." 201 F.3d at 1274. The Tenth Circuit agreed that the Eleventh Circuit's decision in Guapi was correctly decided under the facts of that case. 201 F.3d at 1274. In so doing, the Tenth Circuit distinguished Guapi and Broomfield on their facts. 201 F.3d at 1274. However, the Tenth Circuit believed that the dispositive factor in the Eleventh Circuit's Washington decision was the police officer's failure to tell the bus passenger of the right to refuse consent. 201 F.3d at 1275.

[12]As this Court expressly suggested in Bostick, the presence or absence of advice as to the passengers' right to refuse consent was only one factor weighed in these cases.

[13]Compare, United States v. Arvizu, 121 S. Ct. 2214 (2001) (granting certiorari to consider decision of court of appeals departing from totality-of-the-circumstances test, in Border Patrol vehicle stop and search case, by holding that seven factors had no weight and could not be considered as a matter of law).

Thus, because this one factor among many considered in Washington seemed to be dispositive, Broomfield confused it with being a *per se* rule. However, Washington made it crystal clear that this was only one of many factors it considered and disavowed any *per se* rule.[14]

Interestingly, when the losing defendant in both Broomfield and an earlier Tenth Circuit case, United States v. Hill, 199 F.3d 1143 (1999), cert. denied, 531 U.S. 830 (2000), sought review in this Court, the government told this Court in both cases there was no conflict between the courts of appeal on this point. (Pet. at 19-20 n. 1) The government argued then that "the cases were factually distinguishable in several respects," but now attempts to argue credibly that the decision below "eliminated any basis for meaningfully distinguishing Broomfield." (Pet. at 19-20 n. 1) Again, however, mere disagreement on the weight to be accorded one factor in one case, and not even the present case, is no basis for this Court's certiorari jurisdiction.

In truth, the only thing distinguishing this case is that the government lost here, so now it suddenly sees conflict between the circuits. Certainly, its only attempt to explain its sudden change in position, on the basis that this case involves a "one-on-one encounter," is without factual support in the record. Bloomfield involved only one officer on the bus, while this case involved three, all three of whom were directly involved with the Respondents at some point. That this case involves police officers immediately approaching passengers individually, instead of first making a general announcement, is a thin distinction and only

[14]While the dissent in Washington disagreed with the majority opinion, the law of the Eleventh Circuit is the majority opinion. Interestingly, not one judge from the Eleventh Circuit dissented from the denial of Petitioner's petition for rehearing en banc in this case.

one of a number of factors relevant to the issue. In taking this route, Petitioner falls prey to the same ill of which it falsely accuses the court of appeals, i.e., it focuses on only one of the many factors relevant to the totality of the circumstances test set out by this Court.

Second, the fact that one circuit may "criticize" another's resolution of a matter is not a compelling reason for the exercise of this Court's jurisdiction. Sup. Ct. R. 10(a).

Third, the decision of the Ninth Circuit, United States v. Stephens, 206 F.3d 914 (9th Cir. 2000) (Pet. at 20-21), was simply another bus search case involving application of the various facts to the circumstances of that case. It did not even involve the question of consent, as did the present case, but solely the question of whether the passenger had been seized. Petitioner relies primarily on the dissent by one judge to bolster its argument here. However, rehearing en banc was denied in Stephens, and Petitioner did not even seek this Court's review.

In sum, the Tenth Circuit did not reach a "diametrically opposed position" to that of the Eleventh Circuit. (Pet. at 17) It merely disagreed with the application of this Court's precedent to different factual scenarios. As such, there is no conflict between the circuits beyond the mere application of the same test to different facts.

C. This Court Has Given Clear Guidance in this Area.

This Court has amply clarified this area of the law, and the courts of appeal have given no indication they are confused or need further clarification.[15] Petitioner's final plea for intervention based on the "current environment" is a transparent play on emotion to

[15]The government argues that this issue has arisen repeatedly, citing only Eleventh Circuit cases. (Pet. at 22 n. 2) Perhaps the decision below was published precisely because it appeared that state law enforcement agents needed additional guidance.

rescue the lost conviction in this case. However, the Constitution did not change on September 11, 2001. Perhaps more than ever, the primacy of the Constitution and the relationship it creates between government and citizens must be honored.

The decision below, which merely required compliance with the Constitution and precedent of this Court, was a sound application of well-established law to the individual facts of this case. Nothing in our recent national tragedies changed that or impels this Court's reversal of the court of appeals.

CONCLUSION

Because there is no conflict between the decision below and precedent of this Court, or between the circuits on this issue, Petitioner complains merely of the court of appeals' weighing of individual facts in this case. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

GWENDOLYN SPIVEY
Attorney for Respondent Drayton

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 15 1999
THOMAS K. KAHN
CLERK

No. 99-11624
Non-Argument Calendar

D. C. Docket No. 99-00003-4-CR-RH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES D. STANDBERRY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(December 15, 1999)

Before TJOFLAT, BLACK, and BARKETT, Circuit Judges.

PER CURIAM:

Appellant Charles D. Standberry appeals his conviction and sentence for possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841. Appellant was a passenger on a Greyhound bus late for its departure from the Tallahassee, Florida, station. Officers from the Tallahassee Police Department boarded the bus and obtained consent to search the baggage of a number of passengers, including Appellant. Appellant's bag contained a package of about 500 grams of cocaine base. Appellant moved to suppress the cocaine on the ground that his consent to the search was not voluntarily given under this Court's bus search decision in *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998). The district court distinguished the facts of *Washington* and denied the motion. Appellant then pled guilty, was sentenced to 262 months' imprisonment and 5 years' supervised release, and timely appealed. We agree with Appellant that his case is not sufficiently distinguishable from *Washington*, so the police officers' search must be invalidated under that precedent. We therefore vacate Appellant's conviction and sentence and remand to the district court.

This Court has declined to adopt a rule requiring police officers to notify bus passengers of their right to refuse to consent to search of their belongings. *See Washington*, 151 F.3d at 1355; *United States v. Guapi*, 144 F.3d 1393, 1393, 1395 (11th Cir. 1998). Were such notice given in this case, we easily could have

concluded that Appellant's consent to the search was voluntary. When a notice of the right to refuse consent is not given, however, this Court examines the totality of the circumstances to determine whether the consent was voluntary, evaluating whether a reasonable person in the defendant's situation would understand that consent may be refused or would believe that cooperation with law enforcement is required without the possibility for objection. *See Washington*, 151 F.3d at 1355, 1357; *Guapi*, 144 F.3d at 1393, 1395-97. As in *Washington*, which invalidated the challenged bus search, the police officers in this case did not notify Appellant of his right to refuse consent to the search. We therefore must determine whether this case is sufficiently factually distinguishable from *Washington* so that the validity of search may be sustained.

Most of the facts of the bus search in this case are indistinguishable from *Washington*. *Cf.* 151 F.3d at 1355-56. The officers—including Officer Lang, the officer who actually performed the searches—boarded the bus prior to its departure. The officers were plain-clothed, not uniformed (although Lang wore his badge hanging from his neck), and their weapons were concealed from view. Lang began in the back of the bus and proceeded forward. Lang did not block the aisle or otherwise impede egress from the bus. Lang searched at least three other persons before Appellant. No one, including Appellant, was told that they were under arrest

or under investigation, and there was no physical contact between Lang and Appellant. As noted, Lang did not verbally inform anyone that they had a right to refuse consent to the requested search of their bags.

Several facts in this case are distinguishable from *Washington* in the Government's favor. First, there was no general announcement made from the front of the bus that a police search of all passengers was being conducted. Instead, Lang approached persons individually and asked their consent to search one-on-one. Second, the district court made particular emphasis of the fact that it credited Lang's manner and disposition as polite, calm, and not intimidating. Third, Lang did not ask passengers to produce tickets or identification. The district court concluded that these facts distinguished this case from *Washington* because they removed any indication that the officer was giving instructions with which compliance was required rather than requesting consent that could be refused.

On the other hand, several facts in this case are distinguishable from *Washington* in Appellant's favor. Three officers boarded the bus, not two officers as in *Guapi* and *Washington*. After they boarded the bus, two officers moved to the rear; the other apparently remained there while Lang proceeded up the aisle toward the front. The third officer stayed in the driver's seat, facing backward toward the passengers. In this case, therefore, as in *Guapi* and *Washington*, only one officer

actually approached persons to ask for consent to a search. Like *Guapi* and unlike *Washington*, however, there was an officer stationed at the front of the bus. The presence of an officer at the exit, even if not so intended, is an implication to passengers that the searches are mandatory. *See Washington*, 151 F.3d at 1355, 1357; *id.* at 1358 (emphasizing absence of officer at front of bus); *Guapi*, 144 F.3d at 1394, 1396.

Our evaluation of all of these facts leads to the conclusion that this case is controlled by *Washington*. Although several facts support the Government's contention that the facts of this case would be perceived by the reasonable passenger as less coercive than *Washington*, we agree with Appellant that several other facts—particularly the presence of one of the officers at the front of the bus throughout the bus searches—tip the analysis back to a level at least even with the facts of *Washington* in their coerciveness to a reasonable passenger. Thus, in the aggregate, the facts distinguishable from *Washington* cancel out each other by comparison to the baseline—that facts of *Washington* were an invalid search.

The district court should have granted Appellant's motion to suppress the cocaine base discovered in the bus search, which is invalid under *Washington*. Accordingly, we vacate Appellant's conviction and sentence and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12662

D. C. Docket No. 99-00012-CR-4-RH

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 24 2000
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM LAMONT HILL,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of florida

(July 24, 2000)

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

PER CURIAM:

Appellant William Lamont Hill appeals his conviction and sentence for possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841, and conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. § 846. Appellant was a passenger on a Greyhound bus departing from the Tallahassee, Florida, station. Officers from the Tallahassee Police Department boarded the bus and obtained consent to search Appellant's bag, which contained a package of about 333 grams of cocaine base. Appellant moved to suppress the cocaine on the ground that his consent to the search was not voluntarily given under this Court's bus search decision in *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998). The district court distinguished the facts of *Washington* and denied the motion in an oral ruling. *See* R. 1-42 at 106-117. Appellant was convicted by a jury, was sentenced to life imprisonment, and timely appealed. We agree with Appellant that his case is not sufficiently distinguishable from *Washington*, so the police officers' search must be invalidated under that precedent. We therefore vacate Appellant's conviction and sentence and remand to the district court.

This Court has declined to adopt a rule requiring police officers to notify bus passengers of their right to refuse to consent to search of their belongings. *See Washington*, 151 F.3d at 1355; *United States v. Guapi*, 144 F.3d 1393, 1393, 1395 (11th Cir. 1998). Were such notice given in this case, we easily could have concluded

that Appellant's consent to the search was voluntary. When a notice of the right to refuse consent is not given, however, this Court examines the totality of the circumstances to determine whether the consent was voluntary, evaluating whether a reasonable person in Appellant's situation would understand that consent may be refused or would believe that cooperation with law enforcement is required without the possibility for objection. *See Washington*, 151 F.3d at 1355, 1357; *Guapi*, 144 F.3d at 1393, 1395-97. As in *Washington*, which invalidated the challenged bus search, the police officers in this case did not notify Appellant of his right to refuse consent to the search. We therefore must determine whether this case is sufficiently factually distinguishable from *Washington* so that the validity of search may be sustained.

Most of the facts of the bus search in this case are indistinguishable from *Washington*. *Cf.* 151 F.3d at 1355-56. The officers—including Officer Lang, the officer who actually requested Appellant's consent and searched the bag—boarded the bus prior to its departure. The officers were plain-clothed, not uniformed, although Lang displayed his badge while requesting Appellant's consent. Lang began in the very back of the bus, where Appellant was sitting; Lang approached Appellant after first examining the back of the bus and the restroom. Lang did not block the aisle or otherwise impede egress from the bus. No one, including Appellant, was told that they were under arrest or under investigation, and there was no physical contact between

Lang and Appellant. As noted, Lang did not verbally inform Appellant that he had a right to refuse consent to the requested search of his bag.

Several facts in this case are distinguishable from *Washington* in the Government's favor. First, there was no general announcement made from the front of the bus that a police search of all passengers was being conducted. Instead, Lang approached Appellant individually and asked his consent to search one-on-one. Second, Lang did not ask Appellant to produce tickets or identification. Third, the district court noted that it credited Lang's manner and disposition as not overbearing. The district court concluded that these facts distinguished this case from *Washington* because they removed any indication that the officer was giving instructions with which compliance was required rather than requesting consent that could be refused.

On the other hand, several facts in this case are distinguishable from *Washington* in Appellant's favor. Three officers boarded the bus, not two officers as in *Guapi* and *Washington*. After they boarded the bus, two officers moved to the rear. The third officer stayed in the driver's seat, facing backward toward the passengers; although partially obscured by plexiglass, his presence was visible to Appellant and the other passengers. In this case, therefore, as in *Guapi* and *Washington*, only one officer actually approached Appellant to ask for consent to a search (though the second officer was also nearby in the back of the bus). Like *Guapi* and unlike *Washington*, however,

there was an officer stationed at the front of the bus. The presence of an officer at the exit, even if not so intended, is an implication to passengers that the searches are mandatory. *See Washington*, 151 F.3d at 1355, 1357; *id.* at 1358 (Black, J., dissenting) (emphasizing absence of officer at front of bus); *Guapi*, 144 F.3d at 1394, 1396.

Our evaluation of all of these facts leads to the conclusion that this case is controlled by *Washington*. Although several facts support the Government's contention that the facts of this case would be perceived by the reasonable passenger as less coercive than *Washington*, we agree with Appellant that several other facts—particularly the presence of one of the officers at the front of the bus throughout the bus search—tip the analysis back to a level at least even with the facts of *Washington* in their coerciveness to a reasonable passenger. Thus, in the aggregate, the facts distinguishable from *Washington* cancel out each other by comparison to the baseline—that the facts of *Washington* were an invalid search.

The district court should have granted Appellant's motion to suppress the

cocaine base discovered in the bus search, which was invalid under *Washington*. Accordingly, we vacate Appellant's conviction and sentence and remand for further proceedings consistent with this opinion.[1]

VACATED AND REMANDED.

[1] We need not address Appellant's other arguments on appeal—that the prosecution's strike of one potential juror was a *Batson* violation, and that the prosecution made an improper comment during closing argument—because Appellant's conviction is vacated on the Fourth Amendment suppression issue.

APPENDIX C

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
01/27/2000
THOMAS K. KAHN
CLERK

No. 98-2100

D. C. Docket No. 97-00120-CR-J-21B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RUVEL ALFRED SMITH, JR., a.k.a. Rube Smith, etc.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(January 27, 2000)

Before EDMONDSON and MARCUS, Circuit Judges, and STROM*, Senior District Judge.

* Honorable Lyle E. Strom, Senior U.S. District Judge for the District of Nebraska, sitting by designation.

EDMONDSON, Circuit Judge:

Defendant, Ruvel Alfred Smith, Jr., appeals his convictions for conspiring to distribute cocaine and possessing cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841 and 846. Defendant asserts that the district court erred in denying Defendant's motion to suppress. We affirm.

BACKGROUND

This case arises from a bus check at a Jacksonville, Florida, bus station. On 5 May 1997, DEA Special Agent Bruce Savell and Border Patrol Agent James Perkins were conducting narcotics-interdiction surveillance at the bus station. Savell, inside the bus terminal, noticed Defendant's co-indictee, Joseph Tee Bruton. According to Savell, Bruton constantly changed seats, walked around, and scanned the terminal. Bruton watched every passenger who walked through the terminal. Bruton appeared nervous. Savell also noticed two new, hard-sided, suitcases sitting unattended in the terminal. The suitcases appeared to be expensive. Savell observed Bruton and the suitcases for approximately forty minutes.

At some point, Bruton met with Defendant inside the terminal. The two men engaged in a quick, whispered conversation. Defendant and Bruton then turned away from each other and walked in opposite directions. After this exchange, Savell began to observe Defendant. Savell noted that Defendant also walked around the terminal, switched seats, and went in and out of the terminal.

Soon thereafter, Bruton sat down with the previously unattended suitcases between his legs. A boarding announcement was made for a northbound bus, and Bruton picked up the suitcases and walked toward the boarding gate. As he approached the gate, Bruton slid one suitcase across the terminal floor to Defendant. Bruton and Defendant each carried one suitcase through the gate.

Agent Savell waited for about four minutes and then went through the boarding gate. Savell saw the two suitcases in the undercarriage of the bus. He checked the baggage tags attached to the suitcases; the tags revealed that the suitcases belonged to a "Mr. Pender" and had originated in Miami, Florida.

At that point, based on his training and experience,[1] Savell suspected that Defendant and Bruton were carrying drugs in the suitcases.[2] Savell requested and

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[1] At the time of this incident, Savell had been a DEA agent for six years. During those six years, Savell had conducted surveillance and searches at bus stations on hundreds of occasions.

[2] Savell testified that his suspicion was based on several considerations, including Bruton's scanning the terminal and other bus passengers, Defendant and Bruton's nervous behavior, their whispered conversation, and their leaving the suitcases unattended for more than half an hour in the

obtained the bus driver's permission to board the bus and to conduct a bus check. Savell and Perkins, although dressed in plainclothes, displayed their badges as they boarded the bus. The agents' firearms were concealed. Perkins announced to the passengers:

> Good morning, ladies and gentlemen, my partner and I are both federal agents of the United States Department of Justice. Nobody is under arrest or anything like that, we're just conducting a routine public transportation safety check. When we get to you, if you would please show us your bus ticket, some photo identification, if you have some with you, please. And, most importantly, if you would identify which bags are yours on the bus, we'd appreciate it, and we'll be out of your way real quick.

Neither Savell nor Perkins expressly informed the passengers that their cooperation was voluntary. The agents then, beginning in the back of the bus and making their way forward, spoke individually with each passenger. The agents, in addition to inspecting each passenger's ticket and identification, asked each passenger whether the passenger was carrying weapons, drugs, or large amounts of money. The agents stood behind each passenger and did not block the aisle of (or exit from) the bus as they conducted their bus check. The check of passengers failed to reveal a "Mr. Pender" aboard the bus.

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terminal. Savell testified that, in his experience conducting drug-interdiction at the bus station, drug couriers frequently leave their narcotics-laden luggage unattended until immediately before boarding.

When approached by the agents, Defendant offered a one-way ticket from Miami to Charleston, South Carolina, and a driver's license for the agents' inspection. Bruton also displayed a ticket from Miami to Charleston; Bruton said that he was carrying no identification. Defendant and Bruton each denied that he was carrying drugs or weapons, that he had checked luggage, and that he was traveling with anyone. Defendant and Bruton permitted the agents to search their carry-on luggage. The agents frisked Defendant and Bruton, but they found no weapons.

After the agents completed their survey of the passengers, Savell retrieved the two pertinent suitcases from the undercarriage and brought them aboard the bus. Savell asked whether a passenger claimed ownership of the suitcases. No passenger claimed to own the suitcases. Savell then directly asked Defendant and Bruton, individually, whether they owned the suitcases. Both Defendant and Bruton denied ownership of the suitcases.

Savell and Perkins, assisted by two Florida Highway Patrolmen, then opened the suitcases. The agents discovered eleven kilograms of cocaine in the suitcases. Defendant and Bruton were arrested.[3] After making the arrests, the

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[3] Bruton pled guilty and later testified against Defendant at trial.

agents discovered a bus ticket in the name of "Pender" concealed in a seat near Defendant and Bruton.

Defendant moved the district court to suppress certain evidence, including the cocaine found in the suitcases, the Pender ticket, and various statements made by Defendant. Defendant argued that the discovery of all of this evidence flowed from the agents' check of bus passengers. Defendant asserted that the bus check was an unlawful seizure of the bus passengers in violation of the Fourth Amendment. Thus, Defendant contended, the evidence should be suppressed as "fruits of the poisonous tree." The district court disagreed, however, concluding that the bus check did not amount to a "seizure." The district court accordingly denied Defendant's motion to suppress. Defendant was tried by jury and convicted. Defendant appeals.

DISCUSSION

Defendant contends that the district court erred in denying his motion to suppress because: (1) the bus check was a "seizure" within the meaning of the Fourth Amendment; (2) the seizure was not reasonable and violated the Fourth Amendment; and (3) the fruits of the seizure, therefore, must be

suppressed. We accept Defendant's first contention: Circuit precedent mandates the conclusion that the bus check was a "seizure." We, however, conclude that the agents' seizure of Defendant aboard the bus was reasonable under the Fourth Amendment.[4] The district court, therefore, did not err in denying Defendant's motion to suppress.

1. WHETHER THE BUS CHECK WAS A "SEIZURE"

A well-established principle of Fourth Amendment jurisprudence is that a seizure does not occur just because a police officer approaches a person and asks the person a few questions. Florida v. Royer, 103 S. Ct. 1319, 1324 (1983). The Supreme Court, accordingly, has said that a bus check, where government agents board a bus and ask questions of the passengers, is not necessarily a seizure. Florida v. Bostick, 111 S. Ct. 2382, 2387-88 (1991). Instead, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was

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[4] Because we conclude that the bus check was reasonable under the Fourth Amendment, we need not consider the Government's alternative contention that, even if the bus check was an unreasonable seizure, the fruits of the bus check are nonetheless admissible under the inevitable discovery doctrine. See generally, Nix v. Williams, 104 S. Ct. 2501, 2509 (1984) (adopting inevitable discovery exception to exclusionary rule).

not at liberty to ignore the police presence and go about his business.'" Id. at 2387.

In United States v. Washington, 151 F.3d 1354 (11th Cir. 1998), this court considered the propriety of a bus check conducted in a manner nearly identical to the bus check in this case (and, involving the same officers). In that case, the two officers, casually dressed and with their weapons concealed, boarded a bus at the Jacksonville bus station. The officers displayed their badges and announced:

> Good morning, ladies and gentlemen. My partner and I are both federal agents with the United States Department of Justice. No one is under arrest or anything like that, we're just conducting a routine bus check. When we get to you, if we could please see your bus ticket, some photo identification if you have some with you, please, and if you would please identify which bag[] is yours on the bus we'd appreciate it and we'll be out of your way just as quick as we can.

Id. at 1355. The officers went to the rear of the bus and began working their way forward, speaking individually with each passenger and asking them if they were carrying "drugs, weapons, large sums of money, or firearms." Id. The officers stood behind each passenger as they spoke and did not block the passenger's access to the aisle of the bus. Neither officer told the passengers that their cooperation was voluntary. Id. at 1355-56. The court decided that, under those particular circumstances, the bus check constituted a "seizure." Id. at 1357.

We see no important distinction between the conduct of the bus check in this case and the conduct of the bus check in Washington. "[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court." United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993). Given the virtual identity of the essential facts, we, therefore, are bound by the Washington court's decision on the question of seizure.[5] Overcome by precedent, we must conclude that the bus check in this case amounted to a "seizure" within the meaning of the Fourth Amendment.

2. WHETHER THE SEIZURE VIOLATED THE FOURTH AMENDMENT

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[5] That Washington controls our determination that this bus check is a seizure does not mean that every bus check in this Circuit is a seizure. As the Supreme Court has acknowledged, whether a bus check constitutes a seizure is a very fact-sensitive inquiry; for this very reason, the Supreme Court has rejected per se rules governing bus checks. Bostick, 111 S. Ct. at 2389. But, because we find the facts of legal significance in this case identical to those in Washington, we conclude that Washington controls the seizure issue in this case. See generally, New Port Largo, Inc. v. Monroe County, 985 F.2d 1488, 1500 n.7 (11th Cir. 1993) (Edmondson, J., specially concurring) (discussing precedential value of prior panel decisions).

Our conclusion that this bus check constitutes a seizure does not end our inquiry, however.[6] Instead, we must now examine whether the seizure was reasonable under the Fourth Amendment.[7] The temporary, investigative detention of a person is constitutionally permissible if there exists, at the time of the detention, a reasonable suspicion that the person detained has been, is, or is about to be involved in criminal activity.[8] United States v. Blackman, 66 F.3d 1572, 1576 (11th Cir. 1995). Because we conclude that such a reasonable suspicion existed, at the time of the bus check, the district court did not err in denying Defendant's motion to suppress.

[6] "The Fourth Amendment is not, of course, a guarantee against all searches and seizures, but only against unreasonable searches and seizures." United States v. Sharpe, 105 S. Ct. 1568, 1573 (1985) (emphasis in original).

[7] Although Washington resolves the question of whether this bus check was a "seizure," it is wholly inapposite to the second step of our inquiry: given that a seizure occurred, whether the seizure was a reasonable one under the Fourth Amendment. In Washington, it does not appear that the Government contended that (or that the court addressed whether), even if the bus check was a seizure, the seizure was nonetheless reasonable: that is, the seizure was properly based upon the officers' reasonable suspicion or probable cause. See Washington, 151 F.3d at 1357. In this case, the Government, however, vigorously asserts that, even if the bus check was a seizure, it was a constitutionally valid seizure.

[8] In general, a seizure is constitutionally infirm unless the seizing officer has probable cause. Lindsey v. Storey, 936 F.2d 554, 558 (11th Cir. 1991). Where, however, the seizure is brief and minimally intrusive--a temporary, investigative detention--the seizing officer only need have "a reasonable articulable suspicion based on objective facts that the person has engaged in criminal activity." United States v. Blackman, 66 F.3d 1572, 1576 (11th Cir. 1995). Given the minimal degree of intrusiveness involved in the bus check in this case, we treat the bus check as a temporary, investigative detention, requiring only a reasonable suspicion. See id. at 1576-77.

Although reasonable suspicion "requires more than a hunch," id., "the requisite level of suspicion to make an investigative stop is 'considerably less than proof of wrongdoing by a preponderance of the evidence.'" United States v. Glover, 957 F.2d 1004, 1009 (2d Cir. 1992) (quoting United States v. Villegas, 928 F.2d 512, 516 (2d Cir. 1991)). In deciding whether the detaining officers had reasonable suspicion, we look at the totality of the circumstances known to the detaining officers at the time of the detention. United States v. Mikell, 102 F.3d 470, 475 (11th Cir. 1996); United States v. Cruz, 909 F.2d 422, 424 (11th Cir. 1989). And, we view the totality of the circumstances in the light of the officers' special training and experience. United States v. Brignoni-Ponce, 95 S. Ct. 2574, 2582 (1975); see also United States v. Cortez, 101 S. Ct. 690, 695 (1981); United States v. Bowles, 625 F.2d 526, 533-34 (5th Cir. 1980). We also bear in mind that behavior, seemingly innocuous to the ordinary citizen, may "appear suspect to one familiar with the practices of narcotics couriers." Glover, 957 F.2d at 1010; see also United States v. Mendenhall, 100 S. Ct. 1870, 1882 (1980) (Powell, J., concurring); United States v. Gonzalez, 969 F.2d 999, 1004 (11th Cir. 1992).

In this case, given Agent Savell's training and experience, we conclude that the totality of the circumstances created a reasonable suspicion that Defendant and Bruton were engaged in criminal activity. Defendant and Bruton both appeared

nervous in the bus terminal. See United States v. Cruz-Hernandez, 62 F.3d 1353, 1356 n.2 (11th Cir. 1995) (considering suspect's nervousness as factor contributing to reasonable suspicion). Defendant and Bruton's whispered conversation in the bus terminal and their joint transportation of the suitcases made apparent that they were traveling together; yet, they waited separately in the bus terminal, before the boarding call, apparently attempting to conceal their association. See Bowles, 625 F.2d at 534-35 (considering suspects' "efforts to hide association" in airport terminal as factor contributing to reasonable suspicion). Defendant and Bruton left their new, expensive suitcases unattended until immediately before boarding; Agent Savell testified that this is a common practice among drug couriers. See Brignoni-Ponce, 95 S. Ct. at 2582 ("In all situations, the officer is entitled to assess the facts in light of his experience in detecting [narcotics trafficking]."). The suitcases originated in Miami, a known "source city" for narcotics on the East Coast. See Bowles, 625 F.2d at 534 (finding fact that suspect was traveling from known drug source city "not an insignificant factor"). And, Bruton scanned and surveilled the terminal, watching every person who passed by him in the bus station. See Mendenhall, 100 S. Ct. at 1882 (Powell, J., concurring) (noting as factor in reasonable suspicion analysis that suspect "scanned the entire gate area"); see also United States v. Puglisi, 723

F.2d 779, 789 (11th Cir. 1984); Bowles, 625 F.2d at 535; United States v. Barnard, 553 F.2d 389, 391-92 (5th Cir. 1977).

We conclude that, at the time of the bus check, ample facts existed to give rise to a reasonable suspicion that Defendant and Bruton were involved in criminal activity. The temporary, investigative detention of Defendant aboard the bus, consequently, was reasonable under the Fourth Amendment. The district court, therefore, properly denied Defendant's motion to suppress. Defendant's convictions and sentence are AFFIRMED.

AFFIRMED.